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Nos. 80-1538 and 80-1934

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER, ET AL., APPELLANTS

v.

J. and R. DOE, AS GUARDIANS AD LITEM FOR I. DOE, ET AL.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS and TEXAS EDUCATION AGENCY,
APPELLANTS

v.

CERTAIN NAMED and UNNAMED UNDOCUMENTED
ALIEN CHILDREN

ON APPEALS FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN NO. 80-1538 AND BRIEF FOR THE UNITED STATES IN NO. 80-1934

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QUESTIONS PRESENTED

1. Whether Section 21.031 of the Texas Education Code, which permits local school districts to exclude from their public schools alien children who were not "legally admitted" into the United States or to charge tuition for the admission of such children, is invalid under the Supremacy Clause of the Constitution because it intrudes upon the exclusive authority of the federal government to regulate immigration or because it is pre-empted by the Immigration and Nationality Act or Title I of the Elementary and Secondary Education Act.

2. Whether an alien who entered the United States in violation of federal immigration laws and is present in a state is a person within the jurisdiction of the state within the meaning of the Equal Protection Clause of the Fourteenth amendment.*

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* Appellants have also presented the question whether, assuming that aliens who entered the United States in violation of federal immigration laws are persons protected by the Equal Protection Clause, Section 21.031 of the Texas Education Code is invalid under that Clause. The United States does not address that question.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
A. *Plyler* v. *Doe*	2
B. *In re Alien Children*	4
Introduction and summary of argument	5
Argument	10
I. Section 21.031 of the Texas Education Code is not preempted by Congress' exclusive authority in immigration matters or by federal laws and treaties	10
A. Section 21.031 of the Texas Education Code is not, on its face, inconsistent with the exclusive authority of Congress over immigration or with the Immigration and Nationality Act	11
B. Section 21.031 of the Texas Education Code is not preempted by Title I of the Elementary and Secondary Education Act	20
II. Aliens who have entered or remained in the United States in violation of federal immigration law and who are present in a state are "persons within its jurisdiction" for purposes of the Equal Protection Clause of the Fourteenth Amendment	24
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Ambach v. *Norwick*, 441 U.S. 68	6, 11, 17
Blake v. *McClung*, 172 U.S. 239	26
Bolanos v. *Kiley*, 509 F.2d 1023	25

Cases—Continued Page

Burrafato v. *United States Department of State*, 523 F.2d 554, cert. denied, 424 U.S. 910 27
Chicago & North Western Transp. Co. v. *Kalo Brick & Tile Co.*, No. 79-1336 (Mar. 9, 1981) 21
Commonwealth Edison Co. v. *Montana*, No. 80-581 (July 2, 1981) 22
De Canas v. *Bica*, 424 U.S. 351 ..... 7, 11, 12, 13, 14, 15, 16, 21, 27
Elkins v. *Moreno*, 435 U.S. 647 ..... 14, 17
Examining Board v. *Flores de Otero*, 426 U.S. 572 6
Exxon Corp. v. *Governor of Maryland*, 437 U.S. 117 22
Federation for American Immigration Reform v. *Klutznick*, 486 F. Supp. 564, appeal dismissed, 447 U.S. 916, aff'd mem., No. 80-1246 (D.C. Cir. Nov. 6, 1980), cert. denied, No. 80-975 (Mar. 23, 1981) 24
Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 ..... 15, 21
Foley v. *Connelie*, 435 U.S. 291 ..... 6, 11, 17
Graham v. *Richardson*, 403 U.S. 365 ..... 6, 16, 17
Griffiths, In re, 413 U.S. 717 6
Hernandez v. *Houston Independent School District*, 558 S.W.2d 121 25
Hines v. *Davidowitz*, 312 U.S. 52 21
Holley v. *Lavine*, 529 F.2d 1294, cert. denied, 426 U.S. 954 25
Leng May Ma v. *Barber*, 357 U.S. 185 27
Mathews v. *Diaz*, 426 U.S. 67 ..... 8, 9, 18-19, 20, 24, 27
Missouri ex rel. Gaines v. *Canada*, 305 U.S. 337 25
National League of Cities v. *Usery*, 426 U.S. 833 17
Nyquist v. *Mauclet*, 432 U.S. 1 ..... 6, 19, 27
Pennhurst State School and Hospital v. *Halderman*, No. 79-1404 (Apr. 20, 1981) 23
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 15
Saxbe v. *Bustos*, 419 U.S. 65 13
Schneider v. *INS*, 65 F. Supp. 377 27
Shaughnessy v. *Mezei*, 345 U.S. 206 24
Simmiolkjier, In re, 71 F. Supp. 553 27
Sugarman v. *Dougall*, 413 U.S. 634 6
Takahashi v. *Fish & Game Commission*, 334 U.S. 410 16

Cases—Continued — Page

Toll v. *Moreno*, 441 U.S. 458 17
Traux v. *Raich*, 239 U.S. 33 17
United States v. *Otherson*, 637 F.2d 1276, petition for cert. pending, No. 80-6548 ..... 5, 25
United States v. *Tsuda Maru*, 479 F. Supp. 519.... 27
Williams v. *Williams*, 328 F. Supp. 1380 25
Wong Wing v. *United States*, 163 U.S. 228 24
Yick Wo v. *Hopkins*, 118 U.S. 356 ..... 24, 25

Constitution, charter, treaty, statutes and regulations:

United States Constitution:
Art. I, § 2, cl. 3 24
Art. I, § 8, cl. 4 (Naturalization Clause) 11
Art. VI, cl. 2 (Supremacy Clause) 10, 14, 17
Fifth Amendment, Due Process Clause...9, 19, 24, 27
Fourteenth Amendment:
Section 1 24
Due Process Clause 24, 25, 27
Equal Protection Clause .....*passim*
Section 2 24
Section 5 17
United Nations Charter:
Art. 55 11
Art. 56 11
Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847:
Art. 31 11
Art. 47 11
Bilingual Education Act, 20 U.S.C. (Supp. III) 3222(a) 22
Elementary and Secondary Education Act of 1965 (ESEA), Title I, 20 U.S.C. (Supp. III) 2701 *et seq.* 20
20 U.S.C. (Supp. III) 2701 22
20 U.S.C. (Supp. III) 2711(a) 23
20 U.S.C. (Supp. III) 2711(c) 23
20 U.S.C. (Supp. III) 2711(c)(2) 22
20 U.S.C. (Supp. III) 2740 23
20 U.S.C. (Supp. III) 2836 21

Constitution, charter, treaty, statutes and regulations—Continued

	Page
Immigration and Nationality Act, 8 U.S.C. (& Supp. III) 1101 *et seq.*:	
8 U.S.C. 1101(a)(15)(H)	16
8 U.S.C. 1105a(a)(3)	13
8 U.S.C. (& Supp. III) 1182	12
8 U.S.C. (& Supp. III) 1182(a)	14
8 U.S.C. 1182(a)(14)	16
8 U.S.C. 1182(d)(4)	14
8 U.S.C. 1182(d)(5)	14
8 U.S.C. 1184	12
8 U.S.C. 1201 *et seq.*	13
8 U.S.C. (& Supp. III) 1251 *et seq.*	13
8 U.S.C. 1251(a)(1)	13
8 U.S.C. 1251(a)(2)	13
8 U.S.C. 1252	13
8 U.S.C. (& Supp. III) 1253(h)	14
8 U.S.C. (& Supp. III) 1254	14
8 U.S.C. 1255	14
8 U.S.C. 1324	15
8 U.S.C. 1325	13
Medicare Act, 42 U.S.C. 1395*o*(2)	19
7 U.S.C. (Supp. III) 2015(f)	20
18 U.S.C. 242	26
26 U.S.C. (& Supp. III) 3304(a)(14)(A)	20
42 U.S.C. 1382c(a)(1)(B)	20
42 U.S.C. (& Supp. III) 1983	3
42 U.S.C. 2000d	3
42 U.S.C. 2000h-2	6
Tex. Educ. Code Ann. tit. 2 (Vernon Cum. Supp. 1980):	
§ 21.031	*passim*
§ 21.031(a)	10
§ 21.031(b)	10
§ 21.031(c)	10
42 C.F.R. 435.402(b)	20
45 C.F.R.:	
Section 155.4(b)	20
Section 157.3(b)	20
Section 190.4(a)(4)	20
Section 233.50	20, 23

Miscellaneous: Page

71 Cong. Globe 2766 (1866) 25
H.R. Rep. No. 93-805, 93d Cong., 2d Sess. (1974).. 23
H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. (1978) 21, 23
Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 Harv. L. Rev. 841 (1981) 25
Statement by the President, United States Immigration and Refugee Policy, 17 Weekly Comp. of Pres. Doc. 829 (July 30, 1981) 18
Testimony of William French Smith, Attorney General, before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary and the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 97th Cong., 1st Sess. (July 30, 1981) 18

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OPINIONS BELOW

The opinion of the court of appeals in No. 80-1538 (J.S. App. A-1 to A-32) is reported at 628 F.2d 448, and the opinion of the district court in No. 80-1538 (J.S. App. A-35 to A-82) is reported at 458 F. Supp. 569. The court of appeals' order of summary affirmance in

No. 80-1934 (J.S. App. 9) is unreported, and the opinion of the district court in No. 80-1934 (J.S. App. 19-110) is reported at 501 F. Supp. 544.

JURISDICTION

The judgment of the court of appeals in No. 80-1538 was entered on October 20, 1980, and the petition for rehearing was denied on November 17, 1980. J.S. App. A-31. The notice of appeal in No. 80-1538 was filed on December 18, 1980, and the appeal was docketed as of February 12, 1981. The order of summary affirmance in No. 80-1934 was entered on February 23, 1981, and a notice of appeal and an amended notice of appeal were filed on March 2 and March 13, 1981, respectively. The appeal in No. 80-1934 was docketed as of May 8, 1981. In both cases, the jurisdiction of this Court rests on 28 U.S.C. 1254(2).

STATEMENT

In May 1975, the Texas legislature revised its education laws to permit local school districts to deny enrollment in their public schools to alien children who were not "legally admitted" into the United States or to charge tuition for the admission of such children. The 1975 revision also withholds from local school districts any state funds for the education of alien children who were not legally admitted into the country. Tex. Educ. Code Ann. tit. 2, § 21.031 (Vernon Cum. Supp. 1980). These two cases involve challenges to the authority of the State of Texas not to bear the expense of educating alien children who entered the United States in violation of the immigration laws and to permit local school districts to exclude these children from public school or to charge tuition for their admission.

A. *Plyler* v. *Doe*

This action was filed in the United States District Court for the Eastern District of Texas on September 16, 1977, by parents of alien children residing in Tyler, Texas, who did not have documentation of lawful admis-

sion into the United States. The case was brought as a class action on behalf of all similarly situated alien children in Tyler (Compl. 6-7). The complaint named as defendants the Superintendent and members of the Board of Trustees of the Tyler Independent School District (*id.* at 14).

The complaint alleged that the School District's implementation of Section 21.031 of the Texas Education Code resulted in the exclusion from the Tyler public schools of all members of the plaintiff class, denying plaintiffs' rights under the Equal Protection Clause and 42 U.S.C. (& Supp. III) 1983 and 42 U.S.C. 2000d. The complaint sought declaratory and injunctive relief (Compl. 8).

A hearing on plaintiffs' request for preliminary relief was held on September 9, 1977. The State of Texas intervened as a defendant at that hearing (Tr. 163). On September 12, 1977, the court preliminarily enjoined defendants from enforcing Section 21.031 to withhold a free education from the named plaintiffs.

After the case was certified as a class action (order of October 25, 1977), the court on December 12 and 16, 1977, held a hearing on plaintiffs' request for permanent relief. On September 14, 1978, the district court held that § 21.031, and the Tyler School District's implementation of it, violated plaintiffs' rights under the Equal Protection Clause, and that federal law preempted the state statute (J.S. App. A-35 to A-82). The court permanently enjoined defendants from enforcing § 21.031 to deny plaintiffs a tuition-free education (J.S. App. A-33).

Both the State of Texas and the Tyler Independent School District appealed. On October 20, 1980, the Fifth Circuit affirmed the district court's order. The court of appeals reversed the lower court's holding that § 21.031 is preempted by federal law (J.S. App. A-7 to A-14), but affirmed its holding that § 21.031 violates the equal protection rights of alien children who were not legally admitted into the United States (J.S. App. A-14 to A-30). Rehearing was denied on November 17, 1980 (J.S. App. A-31).

Both Texas and the School District appealed to this Court, and the Court noted probable jurisdiction on May 4, 1981.

B. *In re Alien Children*

During 1978 and 1979, suits challenging the constitutionality of § 21.031 and various local practices undertaken on the authority of that statutory provision were filed in the United States District Courts for the Southern, Western, and Northern Districts of Texas (J.S. App. 20-21). Each suit named as defendants the State of Texas and the Texas Education Agency, as well as local school officials.

In September 1979, about a year after the district court's ruling in *Plyler* v. *Doe*, *supra*, the State filed a motion with the Judicial Panel on Multidistrict Litigation (J.S. App. 21) to consolidate into one action all the other related cases that were pending in district courts in Texas but were not yet decided. On November 16, 1979, the panel consolidated all claims against the State and the Texas Education Agency into one action to be heard in the Southern District of Texas. The claims against local officials were retained in the districts in which the cases had been filed. On February 1, 1980, the district court for the Southern District of Texas granted the United States' motion to intervene as plaintiff in the consolidated action.

The hearing in this case was held between February 19 and March 27, 1980. On July 21, 1980, the district court entered an opinion and order holding that the portions of § 21.031 that denied undocumented alien children a state-supported education violated the Equal Protection Clause of the Fourteenth Amendment (J.S. App. 17-68).

While the appeal in this case was pending,[1] the court of appeals rendered its decision on the appeal in *Doe* v. *Plyler*. Apparently on the authority of that precedent,

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[1] On August 11, 1980, the court of appeals stayed the district court's order pending appeal. Justice Powell vacated the stay on September 4, 1980, No. A-179, 1979 Term.

the court of appeals, on February 23, 1981, summarily affirmed the district court's decision in the statewide case (J.S. App. 9).

The State of Texas appealed from the order of summary affirmance entered below, and this Court noted probable jurisdiction on June 15, 1981. The two cases have been consolidated for briefing and argument.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The interests of the United States in these cases are limited, and the coverage of this brief will be correspondingly limited. Of the three issues presented, the federal interests reach only the first two. The United States has an interest in the primacy of federal law dealing with matters of immigration and naturalization and in Congress' plenary authority to legislate in these areas. Similarly, because of implications for federal authority to enforce federal civil rights laws, the United States has an interest in the applicability of the Equal Protection Clause to persons who are physically, albeit illegally, within a state's jurisdiction. See, *e.g.*, *United States* v. *Otherson*, 637 F.2d 1276 (9th Cir. 1980), petition for cert. pending, No. 80-6548.

By contrast, whether the State of Texas is constitutionally obligated to bear the expense of educating school-age children who entered the United States in violation of federal law and whether local school districts are constitutionally required to admit such children to their public schools are issues that affect the State of Texas and the school districts, not the United States. Accordingly, the United States will leave to the parties directly affected the arguments concerning whether the Equal Protection Clause requires Texas to educate alien children who were not lawfully admitted into the United States.[3]

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[2] Because our argument is limited to the questions in the case of specific interest to the United States (see pages 5-6, *infra*), we do not here summarize the record.

[3] The United States has not participated in recent cases before this Court not involving the United States insofar as they concern

I

Section 21.031 of the Texas Education Code permits local school districts in Texas to charge tuition to chil-

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the rights of aliens under the Equal Protection Clause. See *Ambach* v. *Norwick*, 441 U.S. 68 (1979); *Foley* v. *Connelie*, 435 U.S. 291 (1978); *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977); *Examining Board* v. *Flores de Otero*, 426 U.S. 572 (1976) (see Brief for the United States as Amicus Curiae, No. 74-1267, 1975 Term, at 2-3 n.1); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *Graham* v. *Richardson*, 403 U.S. 365 (1971).

In No. 80-1934, *In re Alien Children Education Litigation*, the United States intervened in the district court as a plaintiff, pursuant to 42 U.S.C. 2000h-2, contending that Section 21.031 of the Texas Education Code is invalid under the Equal Protection Clause. However, the complaint in intervention was based on the contention that § 21.031 discriminates on the basis of national origin, one of the forms of discrimination to which the Attorney General's authority under 42 U.S.C. 2000h-2 is addressed. The district court rejected that contention (80-1934 J.S. App. 54), and the government did not renew it in its motion for summary affirmance in the court of appeals in No. 80-1934; that motion was based on the Fifth Circuit's previous decision in No. 80-1538, *Plyler* v. *Doe*, which held § 21.031 invalid under the Equal Protection Clause by application of a rational basis test having nothing to do with national origin. 80-1538 J.S. App. A-24 to A-30. Indeed, the district court in No. 80-1538 observed that the claim of discrimination on the basis of national origin in that case had dropped out by the time of the trial on the merits. 80-1538 J.S. App. A-38 n.4. We do not, moreover, urge affirmance of either judgment below on the ground that § 21.031 invidiously discriminates on the basis of national origin. The original predicate for the United States' participation as a party in the case pursuant to 42 U.S.C. 2000h-2 therefore no longer obtains, because 42 U.S.C. 2000h-2 does not provide for intervention as of right where a party alleges a denial of equal protection on the basis of alienage or, as here, on the basis of an alien's status under the federal immigration laws. Accordingly, our current posture in No. 80-1934 is more that of an amicus curiae.

It is true that in No. 80-1538, *Plyler* v. *Doe*, the United States argued in its brief amicus curiae in the court of appeals that § 21.031 is invalid under the Equal Protection Clause because it invidiously discriminates against appellee children. However, consistent with our prior practice in alienage cases involving the states, and with our view that this is an issue that affects state rather than federal interests, we do not argue that point here.

dren who are neither citizens of the United States nor "legally admitted aliens" or to exclude them from the free public schools altogether. In our view, § 21.031 does not constitute constitutionally proscribed state regulation of immigration, a matter within the exclusive province of the federal government, and is not preempted by the Immigration and Nationality Act. We also conclude that § 21.031 is not preempted by or inconsistent with Title I of the Elementary and Secondary Education Act of 1965.

A. Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power" (*De Canas* v. *Bica*, 424 U.S. 351, 354 (1976)), not every state statute that deals with aliens or treats them differently than citizens is a regulation of immigration and thus per se preempted. This Court's decision in *De Canas* v. *Bica* makes clear that a state statute that adopts for proper state purposes the federal standards for the legal entry of aliens into the United States does not constitute the regulation of immigration as such.

De Canas also disposes of any argument that § 21.031 is preempted by the Immigration and Nationality Act, at least insofar as the State of Texas and its local school districts look to *federal* law and administrative decisions in determining whether an alien has been "legally admitted." Here, as in *De Canas*, the state statute focuses upon the local effects of illegal immigration and concerns a subject matter—education—that traditionally has been a matter of paramount state concern. And here, as in *De Canas*, we are aware of no indication in the legislative history of the Immigration and Nationality Act of a congressional intent to preclude even harmonious state laws touching upon aliens in general or specifically upon the particular local effects of illegal immigration sought to be addressed by the state.

Although we are of the view that § 21.031 of the Texas Education Code is not preempted by the Immigration and Nationality Act, we would view quite differently a state law that excluded from public schools (or permitted the charging of tuition to) alien children who are *lawfully*

present in the United States as either immigrants or nonimmigrants. This issue could become relevant with respect to many of the alien children who are appellees in this case if Congress enacts the Administration's recent proposals for dealing with illegal immigration. Under one feature of these proposals, any alien who was present in the United States prior to January 1, 1980 in violation of the immigration laws could apply for a new status of "renewable term temporary resident" which, after a period of 10 years, would permit the alien to attain permanent resident status.

Finally, whatever restraints the Equal Protection Clause, standing alone, may impose on the states in excluding aliens (whether or not lawfully admitted into the United States) from state programs, it is clear that the Constitution does not impose comparable restraints on Congress. *Mathews* v. *Diaz*, 426 U.S. 67, 77-78 (1976). In particular, the Court made clear in *Mathews* v. *Diaz* that Congress may exclude illegal entrants from participation in federal programs, and such aliens have been so excluded under a number of statutes and regulations.

B. Section 21.031 of the Texas Education Code also is not preempted by Title I of the Elementary and Secondary Education Act of 1965 (ESEA). That Act establishes a system of federal financial assistance to local educational agencies to supplement state and local funds used in the schooling of "educationally deprived" children.

Federal preemption of § 21.031 is not suggested by the nature of the subject matter involved, for, as Congress recognized in enacting the ESEA, education traditionally has been the province of the states rather than the federal government. Nor are we aware of any indication in the text or legislative history of Title I of the ESEA that Congress intended to preempt state standards for the admission of children to public schools or to require local school districts to admit undocumented alien children as a condition to the receipt of supplemental funds under Title I for educationally deprived children.

II

Aliens who have gained admission into the United States, whether legally or illegally, are "persons" within the contemplation of the Constitution. And where these aliens are present within the territorial boundaries of one of the states, they plainly are "within its jurisdiction" for purposes of the Equal Protection Clause of the Fourteenth Amendment. If the quoted phrase is used in a geographic sense, then obviously an alien present within the borders of a state is "within its jurisdiction." The result is the same if the quoted phrase is intended to bring within the protection of the Equal Protection Clause all those who are amenable to the laws of the state. The Equal Protection Clause simply affords a measure of protection to aliens present in violation of federal law when they *are* subjected to the operation of state law. Absent such coverage, a state might be free to discriminate against such aliens on the basis of their race or national origin or even to augment the penalties for violations of its generally applicable criminal laws by such aliens, imposing, for example, a maximum penalty of five years' imprisonment against such persons for committing an offense which carries a maximum three-year sentence when committed by anyone else.

Moreover, to conclude that an alien present in the United States in violation of federal law is not covered by the Equal Protection Clause might produce the anomalous result that such an alien is entitled to *less* protection from unequal treatment by a state than by the federal government, because an alien who is present in the United States in violation of the immigration laws plainly *is* a "person" for purposes of the Due Process Clause of the Fifth Amendment, including its equal protection component. *Mathews* v. *Diaz*, 426 U.S. 67, 77-78 (1976). The United States has an interest in assuring the foreign nations of which aliens in this country are nationals that such aliens are protected by the Constitution when they are present in a state.

ARGUMENT

I. SECTION 21.031 OF THE TEXAS EDUCATION CODE IS NOT PREEMPTED BY CONGRESS' EXCLUSIVE AUTHORITY IN IMMIGRATION MATTERS OR BY FEDERAL LAWS AND TREATIES

Sections 21.031(b) and (c) of the Texas Education Code provide that only children who are citizens of the United States or "legally admitted aliens" are entitled to be admitted to the State's public free schools without charge. By operation of that section, local school districts may—but are not required to—either charge tuition to children who are neither citizens nor "legally admitted aliens" or exclude them from the free public schools altogether.[4]

Appellees argued in the courts below, and may well argue in this Court in support of the judgments below, that Section 21.031 of the Texas Education Code is invalid under the Supremacy Clause of the Constitution (Art. VI, cl. 2)[5] because it is a constitutionally impermissible regulation of immigration, a matter reserved exclusively to the federal government, and because it is inconsistent with federal laws and treaties. Of the

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[4] We shall discuss the preemption issues in this case by focusing on the practices of the local school districts, because that is where the Texas statute, as implemented, most directly affects the complainant children. If, as we submit, these local practices are not preempted by federal law, it necessarily follows that the State of Texas is not barred by federal statutes and treaties from allocating funds from the Available School Fund to its local school districts pursuant to § 21.031(a) in a manner that excludes such aliens from the formula on which the allocation is made and prohibits local school districts from applying allocated state funds for the aliens' benefit.

[5] The Supremacy Clause provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

federal laws and treaties considered by the courts below, only the Immigration and Nationality Act and Title I of the Elementary and Secondary Education Act of 1965 need be considered at any length.[6]

A. Section 21.031 of the Texas Education Code is not, on Its Face, Inconsistent With the Exclusive Authority of Congress Over Immigration or With the Immigration and Nationality Act

For the reasons given below, we conclude that § 21.031 does not constitute state regulation of immigration, an area within the exclusive province of the federal government. Nor does that section, on its face, conflict with the Immigration and Nationality Act.

1. The Court reaffirmed in *De Canas* v. *Bica*, *supra*, that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." 424 U.S. at 354. But the Court stressed at the same time that a state statute is not necessarily a prohibited regulation of immigration merely because it deals with aliens or treats them in a manner that differs from the manner in which it treats citizens. For example, although the Constitution vests in Congress alone the power to "establish an uniform Rule of Naturalization" (Art. I, § 8, cl. 4) for the Nation as a whole, the states are not barred by the Naturalization Clause from *applying* the rule adopted by Congress for purposes of distinguishing between aliens and citizens for proper state purposes. See, *e.g.*, *Ambach* v. *Norwick*, 441 U.S. 68 (1979); *Foley* v. *Connelie*, 435 U.S. 291 (1978). So it is with respect to the subject of aliens generally. Although the federal government is vested with exclusive authority to establish the terms for the admission and residence of aliens in the United

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[6] We agree with the court of appeals in No. 80-1538 (J.S. App. A-13 & n.13) and the district court in No. 80-1934 (J.S. App. 75-87), essentially for the reasons given in their opinions, that § 21.031 is not preempted by Articles 31 and 47 of the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, or by Articles 55 and 56 of the United Nations Charter.

States, a state does not necessarily infringe upon the federal government's exclusive power in the area of immigration and foreign relations by adopting for proper state purposes the standards established by Congress for the regulation of immigration. *De Canas* v. *Bica*, *supra*, 424 U.S. at 355. This includes, as in the present case, attaching consequences to the fact that an alien present in a state has not satisfied the terms of entry established by Congress.

Thus, at least where the state law in question is intended to deal with local problems caused by illegal immigration and has not been shown to have any more than a speculative and indirect incremental impact on immigration, the state's adoption of standards embodied in federal law should not be deemed a proscribed regulation of immigration. *De Canas* v. *Bica*, *supra*, 424 U.S. at 355-356. No finding of a significant impact on immigration has been made here (see 80-1538 J.S. App. A-29; 80-1934 J.S. App. 60-61), and the record in No. 80-1934 suggests that § 21.031 has had no impact on immigration. I Tr. 104-107; III Tr. 427-428; VI Tr. 92-93.[7] Accordingly, Section 21.031 of the Texas Education Code is not a constitutionally proscribed regulation of immigration.

2. There remains the question whether Section 21.031 of the Texas Education Code is preempted by the Immigration and Nationality Act, even if it is not a constitutionally impermissible regulation of immigration as such.

The Immigration and Nationality Act sets forth detailed eligibility criteria for admission of aliens into the United States (8 U.S.C. (& Supp. III) 1182 and 8 U.S.C. 1184) and establishes detailed procedures for the exami-

[7] One of the grounds on which appellants have sought to justify § 21.031 is that it would lessen the incentive for undocumented aliens to enter the United States and thereby diminish illegal immigration. But this is only one of several justifications offered by appellants. Accordingly, here, as in *De Canas* v. *Bica*, the Court is not faced with a situation where regulation of immigration is the sole purpose of a state law, or where the immigration the state law is partially designed to deter is congressionally approved immigration.

nation of aliens who seek to enter the United States. It also provides for the exclusion of aliens who do not qualify for entry (8 U.S.C. 1201 *et seq.*), and for the deportation of aliens who are present in the United States in violation of the immigration laws. 8 U.S.C. (& Supp. III) 1251 *et seq.*[8] We do not interpret these provisions to preempt a state statute such as § 21.031, at least to the extent that local school districts in Texas look to *federal* law and administrative decisions in determining whether an alien child is a "legally admitted alien" for purposes of his entitlement to be admitted to public school without payment of tuition.[9] This conclusion is compelled by *De Canas* v. *Bica*, *supra*.

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[8] Any alien who has entered the United States without the inspection prescribed by law or was excludable at the time of his initial entry is subject to deportation. 8 U.S.C. 1251(a)(1) and (2). However, unless an alien subject to deportation departs voluntarily, he may be physically removed from the country only after he has been found to be subject to deportation in an administrative hearing, 8 U.S.C. 1252, subject to judicial review in the court of appeals, during which deportation is stayed. 8 U.S.C. 1105a(a)(3). In addition, under 8 U.S.C. 1325, any alien who enters the United States at a time or place other than as designated by immigration officers, eludes examination or inspection by such officers, or obtains entry by a willful concealment of a material fact or willfully false or misleading representation, is, for the first such offense, guilty of a misdemeanor punishable by up to six months' imprisonment or a fine of not more than $500. Subsequent convictions for such offenses are felonies.

[9] The phrase "legally *admitted* alien" (emphasis added) suggests that § 21.031 does not permit the exclusion from public school of (or the charging of tuition to) an alien whose initial entry into the United States was lawful but whose presence subsequently became unlawful because of the commission of an act rendering him deportable. In such circumstances, from the state's perspective, the alien properly should be viewed as continuing to be lawfully present under federal law until officials of the federal government find him to be deportable. For example, determinations by the states that an alien should be divested of his status as an alien lawfully admitted for permanent residence (see *Saxbe* v. *Bustos*, 419 U.S. 65 (1974)) or is subject to deportation would, in our view, involve a far more substantial interference with the administration of the federal immigration laws than would a state determination whether the alien had been lawfully admitted. In the former situation, the

In *De Canas* the Court sustained a California statute that imposed criminal sanctions on an employer who knowingly employed an alien who was not entitled to lawful residence in the United States if such employment would have an adverse effect on lawfully resident workers. The Court stressed that the California statute was tailored "to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens" and thereby "focuse[d] directly upon these essentially local problems and [was] tailored to combat effectively the perceived evils." 424 U.S. at 357. In the instant case, Texas, in enacting Section 21.031 of its Education Code, has similarly sought to lessen what it has perceived to be the adverse local effects of illegal immigration on its school districts and its lawfully resident student population. In matters of education, perhaps even more than

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responsible state officials themselves would be required to adjudicate an alien's status under the immigration laws; in the latter, the state officials only would need to determine whether appropriate *federal* officials had determined that the alien could be lawfully admitted. Similar considerations might apply with respect to certain classes of nonimmigrants who were lawfully admitted for a temporary period but who then overstayed their visas. See 8 U.S.C. 1255; *Elkins* v. *Moreno*, 435 U.S. 647, 666-668 (1978).

For like reasons, we do not believe that a local school district, in determining whether an alien had been "legally admitted," properly may look behind the Attorney General's decision to admit an alien (8 U.S.C. (& Supp. III) 1182(a)), to parole him into the United States (8 U.S.C. 1182(d)(5)), or to waive the requirement of proper documentation in a particular case (8 U.S.C. 1182(d)(4)), in order to determine whether the alien was *in fact* eligible for entry. Such decisions are vested in the Attorney General, and the Supremacy Clause prohibits the states from redetermining these questions of federal law.

Finally, we assume that the reference in Section 21.031 of the Texas Education Code to "legally admitted aliens" includes not only aliens whose initial entry was lawful under federal law, but also aliens who entered the United States unlawfully but subsequently were permitted under federal law to remain in the United States. See, *e.g.*, 8 U.S.C. (& Supp. III) 1253(h) (withholding of deportation where the alien may be subject to persecution); 8 U.S.C. (& Supp. III) 1254 (suspension of deportation and adjustment of status).

employment, such measures are well "within the mainstream of * * * police power regulation." *De Canas* v. *Bica*, *supra*, 424 U.S. at 356.

The Court acknowledged in *De Canas*, however, that even state legislation that regulates local matters in a manner that is consistent with pertinent federal law must give way to paramount federal laws. But "[o]nly a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was "'the clear and manifest purpose of Congress'" would justify that conclusion." 424 U.S. at 357, quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 146 (1963), and *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In *De Canas*, the Court uncovered no "specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." 424 U.S. at 358. The same is true here, for we are aware of no indication that Congress intended to preclude even harmonious state laws touching specifically on the education of aliens who are illegally present in the United States. Moreover, in *De Canas*, a proviso to 8 U.S.C. 1324 providing that the prohibition in that section against the harboring of illegal entrants does not render an employer liable for the *employment* of such aliens could have been viewed as a deliberate congressional judgment that employment of aliens should not be made subject to criminal sanctions even by the states.[10] There is no similar provision that could be thought to bear upon the question of state education of aliens who entered the United States unlawfully.[11]

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[10] The United States so argued in its Memorandum filed at the petition stage in *De Canas* at the Court's request. See Memorandum for the United States as Amicus Curiae, No. 74-882, 1974 Term, at 5.

[11] Of course, in *De Canas*, the Court did find some *affirmative* evidence of congressional intent to permit state regulation of employment of undocumented aliens. 424 U.S. at 361-362. There

3. Although we have concluded that § 21.031 is not preempted by the Immigration and Nationality Act, we would view quite differently a state statute that excluded from public schools (or permitted the charging of tuition to) alien children who were lawfully admitted into the United States. In the case of aliens lawfully admitted for permanent residence, for example, Congress has made a judgment that this status should confer on the alien the right generally to the equal benefit of the laws of the state and to full participation in the community. See, *e.g.*, *Graham* v. *Richardson*, 403 U.S. 365, 376-380 (1971); see also *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, 420 (1948). When Congress, through the INS, has conferred that status, a state may not deny to the aliens concerned the opportunity to earn a livelihood: such action by the state would be "tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live

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is, to our knowledge, no comparable indication in the legislative history of a congressional intent that states be permitted to affect the education of such aliens. But we do not attach much significance to this point, because the education in question is furnished by the state itself, not by private parties, as was true of the employment involved in *De Canas*. Congress cannot be expected to authorize the states to establish rules for the conduct of their own public schools.

For similar reasons, we do not find *De Canas* distinguishable on the ground that it involved the *employment* of aliens, a matter that the immigration laws subject to tight regulation by requiring permission of the Attorney General before any nonimmigrant, even one present legally, may work in this country. 8 U.S.C. 1101(a)(15)(H) and 1182(a)(14). It is true that education of aliens is not a similarly central concern of the immigration laws and that a state's denial of a free education to aliens present in the United States cannot, therefore, be said to further one of the central purposes of federal law. But the holding in *De Canas* was not dependent upon a finding that the California statute actually aided in the accomplishment of the purposes of the immigration laws. It was sufficient that the California statute was not *inconsistent* with federal law. The Court should not lightly find an inconsistency in the present setting either, in view of Congress' traditional deference to state authority in the area of education.

where they cannot work." *Truax* v. *Raich*, 239 U.S. 33, 42 (1915).[12] In our view, it would be equally inconsistent with the congressional judgment that a child should be admitted as a permanent resident alien for a state to deny the child a benefit that is otherwise universally available in the state, such as free public education. See also *Graham* v. *Richardson*, *supra* (public assistance).

Similar problems would arise under a state statute that rendered ineligible for certain generally available state programs nonimmigrants who are lawfully present in the United States for a temporary period. Where a nonimmigrant alien child's visa permits him to assume a residency in a state of such a character or duration that he would be entitled under state law to a free public education but for his status under the federal immigration laws, the state's denial of a free education to the child ordinarily would be inconsistent with the congressional judgment to admit the child and therefore invalid under the Supremacy Clause. Cf. *Elkins* v. *Moreno*, 435 U.S. 647, 658, 663-669 (1978); *Toll* v. *Moreno*, 441 U.S. 458 (1979).

The question of the application of state law to aliens who are lawfully present in the United States may soon become directly relevant to the central issue in this case. The Administration has developed and presented to the Congress the outline of a proposal to address the problem of illegal immigration. One feature of the proposal is the creation of a new legal status for aliens who were present in the United States in violation of the im-

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[12] The Equal Protection Clause does permit a state to confine eligibility for certain positions in state employment to citizens where the person occupying the position must exercise important governmental functions. *Ambach* v. *Norwick*, *supra*; *Foley* v. *Connelie*, *supra*. These cases did not consider the extent to which Congress, pursuant to its plenary powers over immigration and naturalization (or pursuant to Section 5 of the Fourteenth Amendment) could restrict the discretion a state has in this regard under the Equal Protection Clause standing alone. Cf. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

migration laws prior to January 1, 1980.[13] If not otherwise excludable, these aliens could apply for the status of "renewable term temporary resident." This status would be subject to renewal every three years, and would allow the alien to apply for permanent resident alien status after 10 years. If Congress adopts the Administration's proposal, it will thereby sanction the long-term presence in the country of the aliens who qualify for and attain this new status.[14] In that event, under the principles discussed above (and absent a contrary provision in the congressional enactment), it may well be that local school districts in Texas could not exclude from their public schools those alien children who initially entered the United States unlawfully but who subsequently were granted the status of "renewable term temporary resident." Cf. note 9, *supra*.

4. Congress' plenary control over immigration and naturalization is significant for an additional reason as well. Whatever restraints the Equal Protection Clause, standing alone, may impose on the states in excluding aliens (whether or not lawfully admitted into the United States) from state programs, it is clear that the Constitution does not impose comparable restrictions on Congress. For, as the Court stated in *Mathews* v. *Diaz*,

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[13] See Statement by the President, United States Immigration and Refugee Policy, 17 Weekly Comp. of Pres. Doc. 829, 830 (July 30, 1981); Testimony of William French Smith, Attorney General, Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, and the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 9-10 (July 30, 1981). Because the transcript of the joint hearing before the two subcommittees has not been printed, we are lodging with the Clerk ten copies of the Attorney General's prepared remarks.

[14] Aliens granted this new status would be ineligible for welfare, federally assisted housing, food stamps, and unemployment compensation. They also would not be eligible to bring their spouses and children into the United States, although they could leave the United States for temporary visits to their homeland without losing their temporary resident status in this country. Statement of the Attorney General, *supra*, note 13, at 10.

supra, 426 U.S. at 78-79 (footnote omitted), "a host of constitutional and [federal] statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country." Thus, although "a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, * * * a comparable classification by the Federal Government is a routine and normally legitimate part of its business." *Id.* at 85; see also *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 7 n.8.

Applying this reasoning, the Court in *Mathews* v. *Diaz* sustained against an equal protection challenge under the Due Process Clause of the Fifth Amendment a provision in the Medicare Act, 42 U.S.C. 1395*o*(2), which grants eligibility for medicare benefits to citizens and those aliens who have been admitted for permanent residence and have resided in the United States for five years. Significantly, the Court in *Mathews* v. *Diaz*, in considering the power of the federal government to exclude some aliens from participation in federal programs, observed that

> the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, *nor the illegal entrant*, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests.

426 U.S. at 80 (first and third emphasis in original). The court made a similar point later in the opinion, stating that in establishing eligibility requirements for Medicare benefits, "surely Congress would at least require that the alien's entry be lawful." 426 U.S. at 82.

Pursuant to its power, recognized in *Mathews* v. *Diaz*, to limit the receipt of federal benefits by aliens who entered the United States illegally, Congress has excluded such aliens from participation in a number of federal programs in addition to Medicare. See 7 U.S.C. (Supp. III) 2015(f) (food stamps); 26 U.S.C. (& Supp. III) 3304(a)(14)(A) (unemployment compensation); 42 U.S.C. 1382c(a)(1)(B) (Supplemental Security Income). Similar restrictions have been adopted in regulations promulgated under other federal statutes. See 42 C.F.R. 435.402(b) (Medicaid); 45 C.F.R. 233.50 (AFDC); see also 45 C.F.R. 155.4(b), 157.3(b) and 190.4(a)(4) (various higher education grant programs). Although no comparable limitation has been imposed on the use of federal funds granted to local school districts under Title I of the Elementary and Secondary Education Act of 1965 or other federal statutes providing financial aid to public schools, it seems clear that such a limitation would be permissible under the holding in *Mathews* v. *Diaz*. Thus, whether or not the Court holds § 21.031 unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, the federal government will retain broad authority to provide for the exclusion from federally funded programs of aliens who have entered or remained in the United States in violation of the immigration laws.[15]

B. Section 21.031 of the Texas Education Code is not Preempted by Title I of the Elementary and Secondary Education Act

Section 21.031 of the Texas Education Code is not preempted by Title I of the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. (Supp. III) 2701 *et seq.*[16] Under Title I, state and local education

[15] Under appropriate circumstances, we believe that Congress, in order to deter illegal immigration, could require the exclusion of aliens who entered the United States in violation of federal law from certain *state* programs as well, even if those programs did not receive federal funding to which such a requirement was imposed as a condition.

[16] Title I is a voluntary program, and the Secretary of Education is empowered to withhold payments if a state or local education

agencies that choose to participate receive federal funds for programs designed to supplement state and local funds used for the schooling of "educationally deprived" children.

Preemption of state law by a federal statute is "not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, No. 79-1336 (Mar. 9, 1981), slip op. 5, quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra*, 373 U.S. at 142; see also *De Canas* v. *Bica, supra*, 424 U.S. at 356. Certainly the nature of the subject matter involved in this case, education, does not suggest a congressional intent to preempt state law. Education traditionally has been—and remains—primarily the province of the states rather than the federal government, and Title I clearly contemplates extensive state regulation of all aspects of this field. See H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. 4 (1978).

Nor has Congress, in enacting ESEA, "unmistakably * * * ordained" the preemption of state laws such as § 21.031. Nothing in Title I expressly requires the states to furnish a free public education to alien children who entered the United States in violation of the immigration laws, and, as explained below, the exclusion of such children does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

It might be argued that § 21.031 is contrary to the broad congressional policy, embodied in Title I, of "provid[ing] financial assistance * * * to local educa-

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agency fails to comply with the requirements of the Act. 20 U.S.C. (Supp. III) 2836. Thus, even if § 21.031 were thought to be incompatible with Title I, the remedy prescribed by Congress would be for the Secretary to withhold federal funds from the State of Texas or from those local school districts in the State that declined to admit (or charged tuition to) aliens who were not lawfully admitted, not for a court to enter injunctive relief prohibiting the implementation of § 21.031.

tional agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs * * * which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. (Supp. III) 2701. But such a general statement of policy, standing alone, cannot form the basis for preemption of all state laws that may have an adverse effect on that policy. *Commonwealth Edison Co.* v. *Montana*, No. 80-581 (July 2, 1981), slip op. 22; *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133-134 (1978).[17] Moreover, even this statement manifests an intent to accomplish the statutory purpose by assisting local educational agencies with their programs, and it therefore is not indicative of an intent to supplant local decision-making authority with respect to eligibility for such programs.

It might also be argued that § 21.031 is preempted because Texas receives additional funds under Title I due to the presence within its borders of substantial numbers of alien children of school age who entered the United States in violation of the immigration laws. The basis for such an argument would be that the amount of funds received by a state under Title I depends in part upon the number of school-aged children in the state from families below the poverty level, as counted in the 1970 census, 20 U.S.C. (Supp. III) 2711(c)(2), and that illegal entrants are included in those census figures.[18] However, it does not appear that census data were used because Congress affirmatively desired the number of undocumented aliens of school age to affect the amount of funds received by a state. Rather, census data were used, despite their recognized inadequacies, because "no other recent statistical base [was] available which [gave] more accurate counts of poverty for the

[17] For the same reason, § 21.031 is not preempted by the broad statement of policy contained in the Bilingual Education Act, 20 U.S.C. (Supp. III) 3222(a).

[18] The 1970 census, like the 1980 census, enumerated undocumented aliens along with all other persons in the states. See page 24 & note 22, *infra*.

entire country down to the local level * * *." H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. 9 (1978). See also H.R. Rep. No. 93-805, 93d Cong., 2d Sess. 7-11 (1974).[19]

But even if Congress had chosen to use census figures for the allocation of Title I funds in part *because* they would include undocumented alien children in the allocation formula, this decision would not in itself furnish sufficient support for the conclusion that Congress intended to *require* the states to furnish all such children a free public education as a condition to the receipt of any Title I funds. For even then the allocation formula could be viewed as a means of encouraging, rather than mandating, the furnishing of a free public education to children who entered the United States in violation of the immigration laws. See *Pennhurst State School and Hospital* v. *Halderman*, No. 79-1404 (Apr. 20, 1981), slip op. 16.[20] Furthermore, as the district court in No. 80-1934 observed (J.S. App. 73), the statutory scheme demonstrates in other respects that accomplishment of the congressional purpose of aiding local programs for educationally deprived children does not require that every child included in the formula for allocation of Title I funds must actually be served by a special Title I program established by a local education agency.

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[19] The formula devised by Congress for apportioning Title I funds also depends in part upon the number of school-aged children in the state from families receiving payments under the Aid to Families with Dependent Children (AFDC) program, (see 20 U.S.C. (Supp. III) 2711(a) and (c)), a program from which aliens who entered the United States in violation of the immigration laws are *excluded*. 45 C.F.R. 233.50. Thus, Congress, in apportioning Title I funds, chose different formulas while recognizing that none was wholly satisfactory. See H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. 8-11 (1978); H.R. Rep. No. 93-805, 93d Cong., 2d Sess. 7-13 (1974).

[20] Moreover, even if such children are not admitted to public schools, they may benefit from Title I if they attend private schools. See 20 U.S.C. (Supp. III) 2740.

II. ALIENS WHO HAVE ENTERED OR REMAINED IN THE UNITED STATES IN VIOLATION OF FEDERAL IMMIGRATION LAW AND WHO ARE PRESENT IN A STATE ARE "PERSONS WITHIN ITS JURISDICTION" FOR PURPOSES OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Section 1 of the Fourteenth Amendment provides in pertinent part:

> No state shall * * * deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

An alien, whatever his status under the immigration laws, surely is a "person" in any ordinary usage of the term. And this Court has made clear that *all* aliens, even those whose presence in the country is unlawful, are "persons" protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. *Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976); see also *Shaughnessy* v. *Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886). The word "persons" in Section 2 of the Fourteenth Amendment, which provides for the apportionment of Representatives among the states according to "the whole number of persons in each State,"[21] also has been interpreted to permit (and even to require) the counting for apportionment purposes of aliens who are present in the United States in violation of the immigration laws. See *Federation for American Immigration Reform* v. *Klutznick*, 486 F. Supp. 564, 576-577 (D.D.C.), appeal dismissed, 447 U.S. 916 (1980), aff'd mem., No. 80-1246 (D.C. Cir. Nov. 6, 1980), cert. denied, No. 80-975 (Mar. 23, 1981).[22] No reason appears why the term "person"

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[21] See also U.S. Const. Art. I, § 2, cl. 3.

[22] See also Brief for the Federal Respondents in Opposition, *Federation for American Immigration Reform* v. *Baldrige*, No.

in the Equal Protection Clause in Section 1 of the Fourteenth Amendment should not be given the same all-embracing construction, encompassing aliens who are unlawfully present in the United States. See *Holley* v. *Lavine*, 529 F.2d 1294 (2d Cir.), cert. denied, 426 U.S. 954 (1976); *Bolanos* v. *Kiley*, 509 F.2d 1023, 1025 (2d Cir. 1975); *Williams* v. *Williams*, 328 F. Supp. 1380, 1383 (D.V.I. 1971); *Hernandez* v. *Houston Independent School District*, 558 S.W.2d 121, 123 (Tex. Civ. App. 1977); cf. 71 Cong. Globe 2766 (1866) (remarks of Sen. Howard); *United States* v. *Otherson*, 637 F.2d 1276 (9th Cir. 1980), petition for cert. pending, No. 80-6548. Indeed, this Court has made clear that the Due Process and Equal Protection Clauses of the Fourteenth Amendment "are *universal* in their application to *all* persons within the territorial jurisdiction" of the state. *Yick Wo* v. *Hopkins*, *supra*, 118 U.S. at 369 (emphasis added).

This conclusion that aliens present in a state in violation of federal law are protected by the Equal Protection Clause is not altered by the fact that the Clause refers to any person "within its [*i.e.*, the state's] jurisdiction." Considering the word "jurisdiction" in the Equal Protection Clause in a geographic sense (see *Yick Wo* v. *Hopkins*, *supra*, 118 U.S. at 369 [23]), the alien appellees in these cases, who *reside* in Texas, plainly come within the reach of the Clause. And the result is the same if, as appears, the phrase "within its jurisdiction" was intended simply to define the class of persons guaranteed the equal protection of a state's laws to consist of all persons who are *subject* to those laws. As the Court said in *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 350 (1938) (emphasis added):

80-975, 1980 Term, at 10-12; Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 Harv. L. Rev. 841, 845-848 (1981).

[23] The Court stated in *Yick Wo*, at the cited page (emphasis added), that the Equal Protection Clause is "universal in [its] application to all persons within the *territorial* jurisdiction" of a state.

> [T]he obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, *within its own jurisdiction.* It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders.

Compare *Blake* v. *McClung*, 172 U.S. 239, 260-261 (1898).

It could not seriously be contended that aliens present within the borders of Texas in violation of federal law are not "within its jurisdiction" in the sense that Texas may not enforce its criminal laws or other police power measures against them; to the contrary, the State seeks to enforce one of its laws, § 21.031 of the Education Code, against such aliens in these very cases. And, of course, they are subject not only to such regulation, but to service of process and to suit, criminal or civil. The Equal Protection Clause therefore affords some measure of protection to aliens present in violation of the immigration statutes in those situations in which they *are* subjected to the operation of state law.

This is not to say, of course, that such aliens necessarily must be treated in precisely the same fashion as all other aliens, either in the circumstances of this case or in other contexts. We do not address that issue here. But, without the protection of the Equal Protection Clause, a state might be free to discriminate against or among such aliens on the basis of their race, color, sex or national origin or to impose more severe criminal sanctions on any such aliens who violate the state's generally applicable criminal laws than would be imposed on citizens or legally admitted aliens. Cf. 18 U.S.C. 242. But see note 26, *infra.*[24]

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[24] The cases upon which appellants rely are wholly inapposite. *Blake* v. *McClung*, *supra*, 172 U.S. at 260-261, the only cited case even to consider the Equal Protection Clause, simply held that a corporation organized and doing business outside of Tennessee

Finally, because aliens who are unlawfully present in the United States are covered by the equal protection component of the Fifth Amendment Due Process Clause (*Mathews* v. *Diaz*, *supra*, 426 U.S. at 77-78), the consequence of finding the Equal Protection Clause inapplicable to such aliens might be that they would be entitled to *less* protection from disparate treatment by the states than by the federal government.[25] This anomalous result would stand the Court's holding in *Mathews* v. *Diaz*, on its head.[26]

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and not subject to the jurisdiction of that State's courts by service of process was not within the jurisdiction of Tennessee for purposes of the Equal Protection Clause. That decision therefore does not suggest that an alien residing *within* a state is not "within its jurisdiction" for purposes of that Clause.

Leng May Ma v. *Barber*, 357 U.S. 185 (1958); *Schneider* v. *INS*, 65 F. Supp. 377 (W.D. Wash. 1946); and *In re Simmiolkjier*, 71 F. Supp. 553 (D.V.I. 1947), all presented questions of statutory construction under the immigration laws. In *Burrafato* v. *United States Department of State*, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976), the court simply held that an alien who entered the country illegally could not bring an action to compel the Secretary of State to specify reasons for the denial of a visa. *De Canas* v. *Bica*, 424 U.S. 351 (1976), was a preemption case that similarly involved only an interpretation of the immigration laws. None of these decisions addressed an equal protection issue.

Finally, *United States* v. *Tsuda Maru*, 479 F. Supp. 519 (D. Alaska 1979), involved an equal protection challenge by a Japanese company to a *federal* statute that barred that company's vessels from fishing in the territorial waters of the United States. That case, involving the right of a foreign company to *enter* the United States' territorial waters, obviously sheds no light on whether aliens who are residing within the United States are protected by the Equal Protection Clause of the Fourteenth Amendment.

[25] Of course, if the Equal Protection Clause were held inapplicable, some protection from arbitrary or invidious treatment of undocumented aliens might well be furnished by the Due Process Clause of the Fourteenth Amendment.

[26] See 426 U.S. at 84-86; see also *Nyquist* v. *Mauclet*, 432 U.S. 1, 7 n.8 (1977).

CONCLUSION

The court of appeals correctly held that the complainants in these cases are persons within the jurisdiction of the State of Texas within the meaning of the Equal Protection Clause of the Fourteenth Amendment, and that the state and local laws at issue here do not violate the Supremacy Clause. The United States takes no position on the other question presented.

Respectfully submitted.

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